Citation: *PS v Canada Employment Insurance Commission*, 2023 SST 502

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	P. S.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated February 8, 2023 (GE-22-3051)

Tribunal member:	Neil Nawaz
Decision date:	April 25, 2023
File number:	AD-23-246

Decision

[1] I am refusing the Claimant permission to appeal because she does not have an arguable case. This appeal will not be going forward.

Overview

[2] The Claimant, P. S., worked as a food services aide at a hospital and rehabilitation centre. On January 12, 2022, Claimant's employer suspended her after she refused to get vaccinated for COVID-19.[1] The Canada Employment Insurance Commission (Commission) decided that it didn't have to pay the Claimant EI benefits because her failure to comply with her employer's vaccination policy amounted to misconduct.

[3] This Tribunal's General Division dismissed the Claimant's appeal. It found that the Claimant had deliberately broken her employer's vaccination policy. It found that the Claimant knew or should have known that disregarding the policy would likely result in loss of employment.

[4] The Claimant is now asking for permission to appeal the General Division's decision. She maintains that she is not guilty of misconduct and argues that the General Division made the following errors:

- It ignored the fact that her collective agreement allowed her to refuse any vaccine; and
- It ignored an important precedent that favoured her position.

Issue

[5] There are four grounds of appeal to the Appeal Division. A claimant must show that the General Division

- proceeded in a way that was unfair;

[1] The Claimant was terminated from her job altogether on January 27, 2022.

- acted beyond its powers or refused to use them;
- interpreted the law incorrectly; or
- based its decision on an important error of fact.[2]

[6] Before the Claimant can proceed, I have to decide whether her appeal has a reasonable chance of success.[3] Having a reasonable chance of success is the same thing as having an arguable case.[4] If the Claimant doesn't have an arguable case, this matter ends now.

[7] At this preliminary stage, I have to answer this question: Is there an arguable case that the General Division erred in finding the Claimant lost her job because of misconduct?

Analysis

[8] I have reviewed the General Division's decision, as well as the law and the evidence it used to reach that decision. I have concluded that the Claimant does not have an arguable case.

There is no case that the General Division ignored or misunderstood the evidence

[9] At the General Division, the Claimant insisted that she did nothing wrong by refusing to get vaccinated. She maintained that, by forcing her to do so under threat of dismissal, her employer infringed her rights.

[10] Given the law surrounding misconduct, I don't see how the General Division made a mistake in rejecting these arguments. When the General Division reviewed the available evidence, it came to the following findings:

- The Claimant's employer was required by the provincial government to establish and enforce a COVID-19 vaccination policy;

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[2] See *Department of Employment and Social Development Act* (DESDA), section 58(1).
[3] See DESDA, section 58(2).
[4] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

- The Claimant's employer adopted and communicated a clear policy requiring employees to provide proof that they had been fully vaccinated;
- The Claimant was aware that failure to comply with the policy by a certain date would cause loss of employment;
- The Claimant intentionally refused to get vaccinated within the timelines demanded by her employer;
- The Claimant did not qualify for either the medical or religious exception permitted under the policy; and

[11] These findings appear to accurately reflect the documents on file, as well as the Claimant's testimony. The General Division concluded that the Claimant was guilty of misconduct because her actions were deliberate, and they foreseeably led to her suspension. The Claimant may have believed that her refusal to follow her employer's vaccination policy was not doing it any harm but, from an EI standpoint, that was not her call to make.

There is no case that the General Division misinterpreted the law

[12] At the General Division, the Claimant argued that getting tested or vaccinated were never conditions of her employment. She notes that her collective agreement contains a provision that specifically excludes employees from having to get vaccinated. She alleges that the General Division disregarded a prior case that found it was not misconduct to refuse to comply with an employer vaccination policy.

[13] For the following reasons, I don't see how the General Division erred in dismissing these arguments.

– Misconduct is any action that is intentional and likely to result in loss of employment

[14] This Tribunal cannot consider the merits of a dispute between an employee and their employer. This interpretation of the EI Act may seem unfair to the Claimant, but it is one that the courts have repeatedly adopted and that the General Division was bound to follow.

[15] It is important to keep in mind that "misconduct" has a specific meaning for EI purposes that doesn't necessarily correspond to the word's everyday usage. The General Division defined misconduct as follows:

> [T]o be misconduct, the conduct has to be willful. This means that the conduct was conscious, deliberate, or intentional. An employee who loses their job due to "misconduct" is not entitled to receive EI benefits; the term "misconduct" in this context refers to the employee's violation of an employment rule. The Federal court of Appeal has stated that "the breach must have been performed or the omission made willfully, that is to say consciously, deliberately or intentionally."
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> Misconduct also includes conduct that is so reckless that it is almost willful. The Claimant doesn't have to have wrongful intent (in other words, she doesn't have to mean to be doing something wrong) for her behaviour to be misconduct under the law.
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> There is misconduct if the Claimant knew or should have known that her conduct could get in the way of carrying out her duties toward her employer and that there was a real possibility of being let go because of that.[5]

[16] These paragraphs show that the General Division accurately summarized the law around misconduct. The General Division went on to correctly find that, when determining EI entitlement, it doesn't have the authority to decide whether an employer's policies are reasonable, justifiable, or even legal.

– **The Claimant's collective agreement is irrelevant when assessing misconduct**

[17] The Claimant argued that her collective agreement relieved her from having to get any kind of vaccination, but case law says that was not the issue. What matters is whether the employer had a policy and whether the employee deliberately disregarded it.

[18] In August 2021, Ontario's Chief Medical Officer of Health issued Directive 6, which required healthcare providers to establish, implement, and enforce a COVID-19

[5] See General Division decision, paragraphs 15–17, citing *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36; *McKay-Eden v Her Majesty the Queen*, A-402-96; and A*ttorney General of Canada v Secours*, A-352-94.

vaccination policy.[6] The Claimant's employer did just that, developing a policy that required all employees to get vaccinated or face, first suspension, then dismissal.

[19] Whether the policy contradicted the collective agreement was not for the General Division to decide. As the General Division put it:

> The Claimant submits her conduct was not misconduct because there was no provision for mandatory vaccination in the collective agreement that governed her employment from the time she was hired. This is not a persuasive argument, as there was no COVID-19 pandemic at that time and the employer is entitled to set workplace health and safety policies as changing circumstances may require.
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> I agree her collective agreement has a clause where she can refuse any vaccination. This has not been taken away. Under the COVID vaccination policy, the Claimant can refuse vaccination as well.
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> The union contract itself goes on to give consequences if a person refuses an influenza vaccine. As stated above, I have no authority to decide whether the employer breached the Claimant's collective agreement or whether she was wrongfully dismissed. The Claimant's recourse for her complaints against the employer is to pursue her claims via her union via a grievance.[7]

[20] Employers can try to impose policies that encroach on their employees' rights, but employees are free to quit their jobs if they want to fully exercise those rights. If an employee believes that a policy violates the terms of their employment contract, they are also free to take their employers to court. However, the EI claims process is not the appropriate place to litigate such disputes.

[21] Here, the Claimant's employer unilaterally imposed a new condition of employment. It was up to the Claimant to decide whether she wanted to comply with the condition or face the consequences of not doing so. For the purpose of assessing

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[6] Under section 77.7 of the *Health Protection and Promotion Act*, *Ontario's* Chief Medical Officer of Health *may issue* directives to health care providers if satisfied that there is an immediate risk to the health of anyone in the province.
[7] See General Division decision, paragraphs 33–35.

misconduct under the EI Act, it is irrelevant whether an employer's new policy violates pre-existing employment rights. That is for other forums to decide.

– **A new case validates the General Division's interpretation of the law**

[22] A recent Federal Court decision has reaffirmed this approach to misconduct in the specific context of COVID-19 vaccination mandates. As in this case, *Cecchetto* involved a claimant's refusal to follow his employer's COVID-19 vaccination policy.[8] The Federal Court confirmed the Appeal Division's decision that this Tribunal is not permitted to address these questions by law:

> Despite the Applicant's arguments, there is no basis to overturn the Appeal Division's decision because of its failure to assess or rule on the merits, legitimacy, or legality of Directive 6 [the Ontario government's COVID-19 vaccine policy]. That sort of finding was not within the mandate or jurisdiction of the Appeal Division, nor the SST-GD.[9]

[23] The Federal Court agreed that, by making a deliberate choice not to follow the employer's vaccination policy, Mr. Cecchetto had lost his job because of misconduct under the EI Act. The Court said that there were other ways under the legal system in which the claimant could have advanced his wrongful dismissal or human rights claims.

[24] Here, as in *Cecchetto*, the only questions that matter are whether the Claimant breached her employer's vaccination policy and, if so, whether that breach was deliberate and foreseeably likely to result in her suspension or dismissal. In this case, the General Division had good reason to answer "yes" to both questions.

– **The General Division did not ignore a binding precedent**

[25] At the General Division, the Claimant cited a case called *A.L.*, in which an EI claimant was found to be entitled to benefits even though he disobeyed his employer's

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[8] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[9] See *Cecchetto* at paragraph 48, citing *Canada (Attorney General) v Caul*, 2006 FCA 251 and *Canada (Attorney General) v Lee*, 2007 FCA 406.

mandatory COVID-19 vaccination policy.[10] The Claimant argues that the General Division dismissed this case even though it was applicable to her own.

[26] However, the General Division was under no obligation to follow decisions from their own tribunal. Members of the General Division are bound by decisions of the Federal Court and the Federal Court of Appeal, but they are not bound by decisions of their colleagues.

[27] Moreover, *A.L.* does not, as the Claimant seems to think it does, give EI claimants a blanket exemption from their employers' mandatory vaccine policies. *A.L.* appears to have involved a claimant whose collective agreement **explicitly** prevented her employer from forcing her to get vaccinated. According to my review of this file, the Claimant has never pointed to a comparable provision in her own employment contract.

[28] As well, *A.L.* was decided before *Cecchetto*, the recent case that provided clear guidance on employer vaccination mandates in an EI context. In *Cecchetto*, the Federal Court considered *A.L.* in passing and suggested that it would not have broad applicability because it was based on a very particular set of facts.[11]

Conclusion

[29] For the above reasons, I am not satisfied that this appeal has a reasonable chance of success. Permission to appeal is therefore refused. That means the appeal will not proceed.

Neil Nawaz
Member, Appeal Division

[10] See *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428, paragraphs 74–76. The Claimant also referred to this case by its file number: AD-22-1889.
[11] See *Cecchetto*, note 8, at paragraph 43.